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No. 87-869

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

OLIVER L. NORTH,
Petitioner,

v.

LAWRENCE E. WALSH, INDEPENDENT COUNSEL,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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SUPPLEMENTAL BRIEF OF PETITIONER

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SUPPLEMENTAL BRIEF OF PETITIONER

Pursuant to Rule 22.6 of the Rules of this Court, petitioner files this supplemental brief to bring to the Court's attention newly discovered evidence that bears on the second Question Presented in the Petition for a Writ of Certiorari. The evidence directly contradicts a factual finding of the court of appeals and establishes that the courts below seriously erred when they categorically refused to allow petitioner to take evidence. In light of this new evidence, at the very least a remand is appropriate to allow compilation of the evidentiary record petitioner repeatedly has sought and been denied.

In the district court and the court of appeals, petitioner argued that the associate counsel could not purport to act pursuant to the Attorney General's regulation because the independent counsel and his staff had taken none of the steps required by 28 U.S.C. § 515 to effectuate their appointments thereunder. Petitioner further argued that the Department of Justice had at the time of issuance interpreted its own regulation—consistent with what petitioner contends is required by § 515—to require associate counsel to take certain steps to effectuate their appointments, and that that interpretation was due considerable weight. As indicated in the petition, petitioner relied on a March 13, 1987 letter from Associate Attorney General Stephen S. Trott to Independent Counsel Walsh, in which he outlined the steps to be taken "[i]n order to effectuate the appointment of your staff" under the regulation promulgated on March 5, 1987. *See* Pet. at 7 n.2; App. to Pet. at 100a.

Despite repeated efforts by petitioner to take evidence or testimony on other, additional efforts by the Department to compel Independent Counsel Walsh to effectuate the appointments at issue,[1] the district court refused to allow an evidentiary hearing of any kind. Instead, it accepted as a full record an affidavit of Associate Independent Counsel Guy Miller Struve, sworn to on June 29, 1987, and filed with the district court in this case. That affidavit stated in relevant part as follows:

> 6. On March 5, 1987, Mr. Walsh accepted the appointment by the Attorney General by taking the Oath of Office as Independent Counsel within an

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[1] The district court pleadings, which are a part of the record in the court of appeals, are replete with petitioner's efforts to take evidence on this precise issue. In the court of appeals, petitioner again argued that the evidentiary record on this issue was incomplete. In the petition, the absence of an evidentiary hearing is noted as well (at page 5).

> agency designated on the appointment form as Office of Independent Counsel: Iran/Contra (Exhibit 5 hereto).
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> 7. On March 13, 1987, Associate Attorney General Stephen S. Trott wrote to Mr. Walsh, stating that Mr. Walsh's staff should complete affidavit of appointment forms and be sworn in and that the affidavits should be sent to the Justice Department (Exhibit 6 hereto). Associate Counsel did not execute new affidavits of appointment as requested by the Associate Attorney General, and the Department of Justice was so informed.

The affidavit left the distinct impression that the matter ended with the Trott letter and Mr. Walsh's response thereto. In July, the Department of Justice reinforced that impression when it informed the district court that the Department had suggested that certain steps should be taken only because it had not known that associate counsel had executed appointment affidavits under the Ethics in Government Act, 28 U.S.C. § 591 *et seq.*[2]

In reliance on the apparent suggestion that the Department of Justice never had followed up, the court of appeals rejected petitioner's argument that the Department's official position, as stated in the Trott letter, underscored the fact that the associate independent counsel never had properly effectuated their "parallel appointments." The court observed:

> The record contains no evidence that Walsh's associate counsel have taken any actions pursuant to Trott's request. North contends that the associate counsel therefore may act only in accordance with their previous appointments by the Special Division. Accordingly, North argues, any legal authority they

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[2] Transcript of Proceedings at 32 (July 1, 1987). The transcript of proceedings in the district court is part of the record in the court of appeals.

> possess proceeds from the Ethics [in Government] Act, and not from the regulation.

App. to Pet. at 16a.[3] But, it concluded, in this particular case associate counsel had done enough. As to the Trott letter, the court stated: "*There is no evidence in the record that the Department ever renewed the request made in General Trott's letter of March 13*, although it never received the affidavits as requested." App. to Pet. at 17a n.40 (emphasis supplied).

A document produced on January 4, 1988, by the Department of Justice in response to petitioner's Freedom of Information Act request[4] confirms that the court of appeals was led to an erroneous conclusion. The document (set out in the Appendix hereto) establishes that on May 18, 1987, two months after the Trott letter, and one month after this litigation began, the Department of Justice still took the position set out in the Trott letter

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[3] In fact, petitioner had more broadly argued that 28 U.S.C. § 515 (and not the Trott letter) required that certain steps be taken that had not been taken. Petitioner relied on the Trott letter only as evidence that the Department of Justice properly understood the mandate of § 515.

[4] On August 10, 1987, petitioner filed requests under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, with the Office of Independent Counsel (Walsh) and the Department of Justice seeking documents relevant to the parallel appointments, among other issues. On October 2, 1987, the earliest date permitted by statute, petitioner filed a complaint under FOIA in the United States District Court for the District of Columbia challenging the failure of the Office of Independent Counsel (Walsh) and the Department of Justice to disclose within the statutory time period documents responsive to petitioner's FOIA requests. Since that time the Department of Justice has made available numerous documents to petitioner (while withholding others in whole or in part), including, on January 4, 1988, the document at issue here. In contrast, respondent Walsh has refused to release any documents and has asserted that petitioner has no right, under FOIA, to the release of any documents.

and did, in fact, renew its request. The document discloses that on May 14, 1987, the Department again contacted the office of Independent Counsel Walsh to ask that his associate counsel take the necessary steps to effectuate their appointments. That was two days after Independent Counsel Walsh first had represented in this litigation that he and his associate counsel were acting pursuant to the Attorney General's regulation (and that there therefore was no need to address the constitutionality of the independent counsel provisions of the Ethics in Government Act) and one day after petitioner had responded that there was no evidence of any actual "parallel appointments." The document establishes that Independent Counsel James C. McKay complied with the Department's request, but that respondent Walsh continued to refuse to do so. As the document puts it, "Independent Counsel Walsh is concerned about the parallel appointment of his staff and intends to discuss his concerns with Associate Attorney General Trott." Whether additional relevant documents exist is, of course, completely unknown. What is certain is that, had the court of appeals been confronted with what, it is now clear, was an about-face by the Department after this litigation arose, it might well have given more serious consideration to the "pre-litigation" position of the Department. But because petitioner was prohibited from making a factual record, the court had no opportunity to consider the issue properly.

Perhaps more importantly, the document also indicates that as of May 1987, one month *after* the subpoena in this litigation was issued, in his own eyes respondent still had not effectuated the "parallel appointment" of his staff because he remained "concerned" about any such appointments. This evidence surely casts serious doubt on the conclusion of the court of appeals that the subpoena was issued by associate counsel acting under authority of the Attorney General's regulation (and not the

Ethics in Government Act). To this day, in fact, there is no evidence that associate counsel ever have received or accepted appointments under the regulation. Under these conditions, the reliance of the courts below on the authority of associate counsel under the Attorney General's regulation, in order to avoid reaching the merits of petitioner's challenge to the Ethics in Government Act, is certainly subject to new question. The document sharply undermines the decision below and compels its reconsideration.

In sum, at a minimum the newly released document establishes that the record on which the district court and court of appeals relied omitted significant information and certainly was not complete. In addition, the document states that associate counsel in fact had not received parallel appointments, and were not acting under authority of the regulation, when the subpoena in question issued.[5] As a result, some 30 lawyers today continue to exercise the extraordinary investigative and prosecutorial power of the state against petitioner and others without any certain source of authority to do so. Under these circumstances, if this Court decides to deny certiorari on the facial constitutionality of the Attorney General's regulation, it would seem appropriate for this Court to grant the petition and remand for compilation of a full and accurate record on the § 515 issue. Given the now-strong likelihood that the existing record in this case is sorely incomplete, and the fact that the district court repeatedly rejected petitioner's efforts to establish

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[5] The document makes clear that no party to the proceedings below took any step to correct the misimpression that had been created in the court of appeals, both as to the absence of further contacts between respondent and Justice on these issues after the Trott letter, and as to the absence of any actual "parallel appointments."

a proper factual record, it would be a true injustice if the rulings on this issue below are allowed to stand.

Respectfully submitted,

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APPENDIX

UNITED STATES DEPARTMENT OF JUSTICE
OFFICIAL FILE COPY

May 18, 1987

Parallel Appointments of the Independent Counsel Staffs

Thomas M. Barba
Deputy Assistant Attorney General
Civil Division

John C. Vail
Assistant Director
Personnel Staff
Justice Management Division

As you are aware, we are in the process of regularizing the parallel appointments of the staffs of the Independent Counsel: Iran/Contra and the Independent Counsel *In Re*: Franklyn C. Nofziger.

I have met with Janis Sposato, General Counsel, Justice Management Division to determine the steps necessary to effect the parallel appointments of the staffs. We have concluded that we need, for each staff member, a Standard Form 171, "Application for Federal Employment," a copy of Standard Form 61, "Appointment Affidavit," and for each attorney, a Department Bar Affidavit.

As a follow-up to Associate Attorney General Trott's letter of March 13, 1987 (copy attached), we have contacted the Administrators of both Independent Counsels. Michael Jones, the Administrator for Independent Counsel McKay has provided us with copies of Standard Forms 61, "Appointment Affidavits" for each staff member and is securing the additional needed documentation. I have corresponded with Mr. Jones via a letter of May

6, 1987 (copy attached) and a subsequent meeting on May 13, 1987.

My staff contacted Francis Cuffie the Administrator for Independent Counsel Walsh telephonically on May 14, 1987. Ms. Cuffie informed us that Independent Counsel Walsh is concerned about the parallel appointment of his staff and intends to discuss his concerns with Associate Attorney General Trott. Although Ms. Cuffie is not aware of the specific nature of Independent Counsel Walsh's concerns, she has assured us that she will contact us as soon as he resolves them.

If you desire further information or clarification please contact me on 633-4621.

Attachments

cc: James I.K. Knapp
Deputy Associate Attorney General

VAIL:er:X4621:5-18-87
Diskette: VAIL1: Parallel Appts
Copies furnished: Oser, Vail, File